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The Bellows of Dying Elephants: Gay-, Lesbian-, and Bisexual-Protective Hate Crime Statutes after R.A.V. v. City of St. Paul

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The Bellows of Dying Elephants:[1] Gay-, Lesbian-, and Bisexual-Protective Hate Crime Statutes after *R.A.V. v. City of St. Paul*

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"[T]here is inherent worth in each human being, and each is entitled to a life of dignity."[2]

Introduction

An upsurge in hate crimes[3] characterized the 1980s and

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1. This phrase is borrowed from Peter Gomes, Harvard University's Memorial Church Minister, who in explaining that the gay backlash is affirmation of the new power of gay, lesbian, and bisexual people and a "last hurrah for the kind of blatant gay-bashing" that was on display at the 1992 National Republican Convention, said, "Gay bashing is the bellows of dying elephants." Bill Turque et. al., *Gays Under Fire,* NEWSWEEK, Sep. 14, 1992, at 34, 39.

2. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story,* 87 MICH. L. REV. 2320, 2381 (1989).

3. For purposes of this discussion, the author uses the term "hate crimes" interchangeably with hate-motivated violence, hate violence, bias-related violence, bias crime, ethnoviolence and violence motivated by prejudice or bigotry. Virginia Nia Lee, *Legislative Responses to Hate-Motivated Violence: The Massachusetts Experience and Beyond*, 26 HARV. C.R.-C.L. L. REV. 287, 288 (1990). The author also uses the foregoing term as defined by the California's Attorney General Commission, namely:

> an act of intimidation, harassment physical force or threat of physical force directed against any person, or family, or their property or advocate, motivated either in whole or in part by hostility to their real or perceived race, ethnic background, national origin, religious belief, sex, age, disability, or sexual orientation, with the intention of causing fear or intimidation, or to deter the free exercise or enjoyment of any rights or privileges secured by the constitution or the laws of the United States or [the state in which the victim is located during the time of the offense] whether or not performed under color of law.

Id. (quoting Cal. Att'y Gen.'s Comm'n on Racial, Ethnic, Religious and Minority Violence, Cal. Dept. of Justice, Final Report 4 (1986).)

have thus far characterized the 1990s. Hate crimes are acts ranging from hate speech[4] to murder that are perpetrated on the basis of race, ethnicity, sex, religion, or sexual orientation.[5] This problem is so widespread that the federal government enacted the Hate Crime Statistics Act of 1990 to compel law enforcement bodies to maintain records of hate crimes.[6] Nationwide, lesbian, gay, and bisexual people top the list of victims of hate-motivated crimes; they are more frequently attacked as a single group than any other minority.[7] Despite this staggering statistic, lawmakers are reluctant

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The author does not recommend a presumption of bias where the victim of a crime belongs to a minority group or is a woman. Such a presumption would likely create an even more divisive situation in relation to the problem of diversity and tolerance. The author reiterates that the motive behind the crime determines whether the crime is indeed a hate crime. Finally, the author urges caution in the implementation of such laws so as not to re-victimize the victim. In other words, officials ought not compel victims to "prove that they did not distort the circumstances, misunderstand the intent [of the crime], or even enjoy it." Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 130 (1987).

4. Hate speech is any speech having the effect of "impugning others on the basis of race, ethnicity, gender, sexual orientation, or religion, and . . . speech depicting rape or other crimes of sexual violence." Rodney A. Smolla, *Introduction: Exercises in the Regulation of Hate Speech*, 32 WM. & MARY L. REV. 207, 207 (1991).

5. The author recognizes the pervasiveness of bias-motivated violence waged against women on a daily basis. Unfortunately, just as the majority of hate crime statutes that this paper will discuss omit gay, lesbian, and bisexual people from their protective ambit, they also frequently fail to include women. Further, the author borrows the concept that subordinating violence exists in a continuum (e.g., verbal harassment to murder). Christine Littleton, *Equality and Feminist Legal Theory*, 48 U. PITT. L. REV. 1043, 1059 (1987).

6. PUB. L. NO. 101-275, 104 Stat. 140 (1990). For the first time in the history of the United States, federal civil rights legislation includes within its scope of study "sexual orientation." *See id.* The Act orders a federal study of hate crimes, including within its scope anti-gay attacks. *Id.* This marks the first time that a federal piece of legislation recognized violence against gay, lesbian, and bisexual people as hate crimes. *Id.*

Despite its recognition of gay, lesbian, and bisexual people as an at-risk group, the Act was not without its intrinsic elements of anti-gay sentiment. The anti-gay tone is especially evident in the comment following on the Act: "Congress finds that the American family life is the foundation of American society . . . Section 2(b) makes clear that nothing in the Act shall be construed to promote or encourage homosexuality. Moreover, no funds appropriated to carry out the Act shall be used for such purposes." *Id. See also* Joseph M. Fernandez, *Recent Development, Bringing Hate Crime Into Focus- The Hate Crime Statistics Act of 1990*, 26 HARV. C.R.-C.L. L. REV. 261, 268-69 (1991). Yet, critics of the Act maintain that it fails to deter hate crimes, attributing its ineffectiveness to the lack of similar hate crime statutes on the state level. Jeff Peters, *When Fear Turns to Hate and Hate to Violence*, 18 HUMAN RIGHTS 22, Spring 1991, at 22.

7. *See* Jean Latz Griffin, *For '91, Chicago Lists 79 Anti-gay Assaults*, CHI. TRIB., Mar. 20, 1992, at C3; *see also Hate Crimes Hit Record High*, L.A. TIMES, Mar. 23, 1993 at B1. By this statement, the author, by no means, intends to infer that violence against a gay man is more severe than violence against, say, a Jewish woman. He recognizes equally the tragedy and harm of violence against any oppressed group. Rather, the author intends to dispel an all-too-common sentiment that vio-

to explicitly prohibit bias crimes against gay, lesbian and bisexual people in hate crime statutes.[8]

In June 1992, the United States Supreme Court reviewed St. Paul's hate crimes ordinance in *R.A.V. v. City of St. Paul*.[9] The ordinance criminalized adverse conduct perpetrated on the basis of the victim's race, ethnicity, religion, or sexual orientation. The Court held the ordinance unconstitutional and established a precedent that will lead to reexamination of hate crime statutes nationwide. This precedent will influence future hate crime legislation by eliminating or reducing the breadth of laws protecting lesbian, gay, and bisexual people.

This comment examines the adverse impact of the *R.A.V.* decision on gay, lesbian, and bisexual people and recommends that lawmakers and policymakers concern themselves with the safety of this minority group. Part I describes the intolerance and violence afflicting the gay community and the public opposition to protective hate crime legislation. Part II details the Supreme Court's holdings and rationales in *R.A.V.* Part III criticizes the Supreme Court majority's analysis which abandons the Court's traditional categorical approach to speech. This section explains how the Court's departure from precedent will harm gay people and asserts their need for protective hate crime legislation. Part IV examines the option of enacting hate crime protective measures as "penalty enhancement" statutes outside the ambit of *R.A.V.*

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lence against gay, lesbian, and bisexual persons is justifiable because these victims are an expendable and disposable lot in society. The author hopes to convey the idea that the forces that perpetrate violence against women, African-Americans, Jews, Native-Americans, Hispanics, Asian-Americans, and other minority groups, are the same forces that perpetrate violence against gay, lesbian, and bisexual people. *See also* Littleton, *supra* note 5, at 1044. Finally, the author builds on the Matsuda concept that systems of subordination operate in "the hands of different dominant-group members." Matsuda, *supra* note 2, at 2334.

> Lower- and middle-class whites might use violence against people of color, while upper-class whites might resort to private clubs or righteous indignation against "diversity" and "reverse discrimination." Institutions - government bodies, schools, corporations - also perpetuate racism through a variety of overt and covert means. . . . Gutter racism, parlor racism, corporate racism, and government racism work in coordination, reinforcing existing conditions of domination.

Id. at 2334-35.

8. Peter M. Cicchino, Comment, *Sex, Lies and Civil Rights: A Critical History of the Massachusetts Gay Civil Rights Bill*, 26 HARV. C.R.-C.L. L. REV. 549, 555 (1991).

9. 112 S. Ct. 2538 (1992) (reviewing the indictment of a white juvenile for burning a cross on the lawn of an African-American family in a predominantly white neighborhood). For a general analysis and defense of the decision in *R.A.V.*, see David Cole, *'Hate Speech' Case: Twisted Path to Good Result*, LEGAL TIMES, July 27, 1992, at S30.

Part I — Legal & Social Status of Gay People

Lesbian women and gay men comprise ten percent of the United States population.[10] They have experienced historical discrimination like racial, ethnic, and religious minorities. Unlike other minorities, however, lesbian, gay, and bisexual people have no federal civil rights protection.[11] Title VII of the Civil Rights Act of 1965 does not prohibit discrimination on the basis of sexual orientation.[12] Further, courts have held that sexual preference is not a suspect or quasi-suspect class.[13]

Similarly, lesbian, gay, and bisexual Americans do not generally enjoy a greater level of protection at the state level. Few states provide protection for lesbian, gay, and bisexual people.[14] Moreover, these state laws have a limited and narrow scope.[15] To compensate for the failure of state and federal government to adequately address hate crimes against lesbian, gay, and bisexual people, numerous municipalities have enacted ordinances protecting gay people against hate crimes.[16]

As the visibility of gay people in the United States increases,[17] so do the number of crimes waged against them. It is not safe to be openly gay in the United States. Gay bashing has escalated, in part due to the national shift to the political right.[18] In recent years, the

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10. *See Nontraditional Affluent Customers*, AM. DEMOGRAPHICS, Nov. 1992, at 10 (citing 1948 Kinsey study); *but c.f.* Sally Jacobs, *Dispute Over Numbers Puts No Damper on Gay Activism*, BOSTON GLOBE, May 21, 1993, at 1 (disputing the ten percent figure). By offering this Kinsey statistic, the author quantifies lesbian, gay, and bisexual presence in society only as a point of fact.

11. *See* Fernandez, *supra* note 6, at 264.

12. *See generally* I. Bennett Capers, Note, *Sexual Orientation And Title VII*, 91 COLUM. L. REV. 1158 (1991).

13. *See* Note, *The Constitutional Status of Sexual Orientation: Homosexuality as A Suspect Classification*, 98 HARV. L. REV. 1285 (1985).

14. *See generally* Fernandez, *supra* note 6, at 266-67.

15. *Id.*

16. Thomas H. Moore, Note, R.A.V. v. City of St. Paul: *A Curious Way to Protect Free Speech*, 71 N.C. L. REV. 1252, 1252-53 (1993).

17. In the United States there are 75 openly gay elected officials, including Congresspersons, judges, mayors, and city councilors. David Tuller, *Gays Win Some, Lose Some*, S.F. CHRON., Nov. 5, 1992, at A12. Throughout the country, there are approximately 1,600 gay organizations, including political, social, activist and student groups. Bob Cohn, *Discrimination: The Limits of The Law*, NEWSWEEK, Sept. 14, 1992, at 38, 39.

18. This political shift has influenced legal ideology and, subsequently, gay rights. The Eighties marked a shift in the federal judiciary, primarily the U.S. Supreme Court, away from progressive intervention on behalf of civil rights plaintiffs. The rightward shift of the High Court, and its attendant hostility toward civil rights complainants, impacts gay plaintiffs. Cicchino, *supra* note 8, at 550.

The federal judiciary, under the Reagan and Bush administrations, has exhibited narrow interpretations of constitutional and statutory laws relating to civil rights plaintiffs, and has sought to re-examine established doctrine in the area of

number of hate crimes perpetrated against gays, "one of the most despised and persecuted minority groups,"[19] rose by 31 percent.[20] In 1989, the National Gay and Lesbian Task Force reported 7,031 incidents of anti-gay violence.[21]

Gay rights advocates[22] acknowledge that although increasing social acceptance may have facilitated victims' reporting of gay bashing and may help explain the escalating statistics,[23] nothing accounts for the increasing severity of the violence.[24] "Drive-by slurs and egg-tossing have given way with more frequency to nail-studded baseball bats and switchblades."[25] One such violent incident occurred on October 27, 1989 in Los Angeles when a sheriff's department patrol car pulled over two gay men driving home from a Halloween party.[26] The police yanked one of the men out of the car, called him anti-gay epithets, knocked him down, handcuffed him, beat him with a nightstick, and repeatedly kicked him in the side, causing broken bones and nerve damage.[27] In another incident, pipe-wielding skinheads yelling "Kill the faggot" beat a gay man into unconsciousness in Laguna Beach, California.[28] Outside a gay

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civil rights and civil liberties. *Id.* at 552. This means limited civil rights protection for all, and gay people have had little civil rights protection to begin with. *Id.* Not only has this narrowed existing rights, but it eliminated the chance of expanding the recognition of rights, particularly for gay plaintiffs. *Id.*

19. *Id.* at 548. A survey tabulated in 1987 by the U.S. Department of Justice concluded that gay, lesbian, and bisexual people were probably the most frequent victims of hate crimes. *Id.* A 1985 public opinion survey revealed that 73% of the respondents thought sexual relations between two adults of the same sex was always wrong. *Id.* Attitudes such as these "contribute to the commission of violence against gay people." *Id.* In 1989, a survey indicated that seven percent of the gay community reported being physically assaulted in the last twelve months as a result of violence targeting gay, lesbian, and bisexual people. *Id.*

20. Turque, *supra* note 1, at 36.

21. Fernandez, *supra* note 6, at 261.

22. For the purpose of brevity, the author reluctantly uses the phrase "gay rights" to mean the rights of lesbian, gay, and bisexual people.

23. Turque, *supra* note 1, at 36. Despite an increase in the number of reports, task force officials maintain that 75-80 percent of gay crime victims never file a police report. Julie Nichols, *YLD Studies Anti-Gay Violence,* 14 BARRISTER, Summer 1987, at 19. Officials attribute this to the homophobia that is rampant within police departments, which leads to "police abuse, unequal enforcement of laws, or deliberate mishandling of cases." *Id.* What is more, police discourage gay, lesbian, and bisexual people from reporting incidents of violence, reasoning that both reporting and investigating is not worth while. *Id.*

24. *See* Nadie Broohan, *Rise in Anti-Gay Crimes Is Reported in New York*, N.Y. TIMES, Mar. 7, 1991, at B3.

25. Turque, *supra* note 1, at 36.

26. Fernandez, *supra* note 6, at 262.

27. *Id.*

28. *Id.*

bar in Burlington, Vermont, a gay man was beaten until he suffered numerous skull fractures and brain damage.[29]

Although no federal criminal statute protects the rights of lesbian, gay, and bisexual people in the United States, the federal government, in an unprecedented move, included gay men and women in the Hate Crime Statistics Act of 1990.[30] The Act requires the Department of Justice to collect data on the incidence of hate crimes in the United States. The purposes of the Act are to (1) compile the empirical data necessary to develop effective policies to fight the problem of hate-motivated violence; (2) raise public awareness; and (3) provoke an official response.[31]

During the 1980s states began to enact legislation criminalizing bias violence. These statutes typically criminalize intimidation and harassment based on prejudice, prohibit acts that are already criminal offenses when those acts are motivated by bias, impose heightened penalties for criminal conduct motivated by bias, and criminally proscribe interference with a person's civil rights.[32] By the decade's end, nearly every state enacted laws providing enhanced penalties for the bias-motivated crimes of racists and bigots.[33]

Incidents in Colorado, the only state that prohibits gay-protective laws, are representative of the increasing frequency and severity of violence against gay people. Three gay men were murdered in separate incidents.[34] In one incident, assailants shouted anti-gay slurs and fatally shot a heterosexual man at a convenience store because they believed he was gay.[35] His pregnant wife waited for him in their parked car as he was being shot.[36] In another incident,

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29. Yvonne Daley, *Beating of Gay Man Raises Stakes for Vermont Hate Crimes Bill*, BOSTON GLOBE, Apr. 22, 1990, at 73.

30. PUB. L. No. 101-275, 104 Stat. 140 (1990). For a description of the Act and some of its latent anti-gay biases, see *supra* note 6.

31. Pub. L. No. 101-275.

32. *See supra* notes 11-16 and accompanying text.

33. James H. Rubin, *Court Says States and Cities May Not Outlaw 'Hate Crimes,'* CHI. DAILY L. BULL., June 22, 1992, at A1. Utah, Wyoming, Nebraska, and Alaska are the only states that do not provide some form of hate crime law in the country. *Id.* The author distinguishes hate crime statutes from enhancement statutes. Whereas the former criminalizes adverse conduct perpetrated because of the victim's sex or minority status, the latter enhances *existing* criminal behavior that is perpetrated on the foregoing basis.

34. Dirk Johnson, *Colorado Homosexuals Feel Betrayed*, N.Y. TIMES, Nov. 8, 1992, at A38.

35. *Id.*

36. *Id.* This case illustrates that no one is shielded from homophobia, even those who do not identify themselves as gay, lesbian, or bisexual. Further, even though the victim in this case was a heterosexual, his victimization continues to terrorize and intimidate persons outside the majority. The author includes this case to point out the tragic irony in the dynamics of hate and violence and to also illustrate the

gay bashers struck a gay man twice in the face as he was leaving a bar.[37] They knocked him to the pavement, causing his skull to hit the concrete so hard that people across the street heard the impact.[38] He died two days later.[39] Gay bashing is not limited in variety nor restricted to isolated incidents.[40]

The statistics only reflect the physical injuries and property damage hate crime violence causes its victims, not the psychological harm. "Violence motivated by prejudice leaves behind acute emotional and psychological scars on the victim and on the victim's community."[41] "Victims of vicious hate propaganda have experienced . . . nightmares, post-traumatic stress disorder, hypertension, psychosis, and suicide."[42] Rates of alcoholism and substance abuse are high among gay people[43] and suicide is the leading cause of death among gay teenagers.[44] "The negative effects of hate messages are real and immediate for the victims."[45] Further, hate speech restricts its victims' personal freedom by forcing them to "quit jobs, forego education, leave their homes, avoid certain public places, curtail their own exercise of speech rights, and otherwise modify their behavior and demeanor."[46] Hate speech forces its targets to destroy their sense of self in order to cope with its psychological violence.[47] In short, hate speech is the tool of "spirit murder."[48] These disturbing facts do not even begin to measure the fear and loss of productivity that result from gay oppression.

Despite the compelling evidence that hate speech disproportionately and severely harms gay people, the public greatly resists extending them any explicit protection. For example, Gainesville, Florida adopted a resolution on June 2, 1992, urging the Alachua County Commission to exclude a homosexual rights amendment from its proposed anti-discrimination ordinance.[49] Commissioner

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point that persons outside the target groups of hate crimes are equally susceptible to violence and harm.

37. Nichols, *supra* note 23, at 19.

38. *Id.*

39. *Id.*

40. *See id.*

41. Fernandez, *supra* note 6, at 262.

42. Matsuda, *supra* note 2, at 2336.

43. Kay Long Cope, *Gay Teenagers Come Out and Find Support,* BOSTON GLOBE, Aug. 22, 1990, at 47.

44. *Protect the Rights of Gays Against Discrimination,* U.S.A. TODAY, June 2, 1992, at 10A.

45. Matsuda, *supra* note 2, at 2336.

46. *Id.* at 2337.

47. Williams, *supra* note 3, at 129-30.

48. *See id.*

49. Matthew Sauer, *Gainesville Resolution Condemns Gay Rights,* ST. PETERSBURG TIMES, June 3, 1992, at 5B.

Courtland Collier, sponsor of the proposition, reasoned that the "special protection" was unnecessary because "we all have equal protection now."[50] Further, the resolution suggested that extending legal protection to gay and bisexual people would lead to protecting "other sexual interests such as pedophilia, bestiality and necrophilia."[51]

Preying on the public's fear and hatred of lesbian, gay, and bisexual people, the religious right and other conservatives, led by Jerry Falwell, Pat Robertson, Billy Graham, Lou Sheldon, Pat Buchanan, and Dan Quayle, have equated homosexuality with morally depraved acts such as child molestation.[52] In their city halls, school boards, and state legislatures, the religious right has waged a well-organized counter-offensive to the gay rights movement's progress.[53] It hopes to push back the gay community's advance into mainstream society.[54] Proponents of gay rights maintain that the movement for gay equality is "a battle about specific issues, such as whether homosexuals have a right to equal job opportunities or to serve in the military."[55] They point out that gay rights do not extend special rights to lesbian, gay, and bisexual people, but only guarantee them the basic human rights the majority enjoys.[56] Groups like the Christian Action Network, (CAN), disagree. In its fundraising efforts, CAN ran thirty-second television advertisements showing clips of gay political activists hugging and wearing black leather attire.[57] The voice over this propaganda advertisement inaccurately stated that "Bill Clinton's vision for a better America includes job quotas for homosexuals. Is this your vision for a better America?"[58]

During the 1992 elections, the religious right generated a number of anti-gay proposals.[59] The most far-reaching proposal was Oregon's Measure 9. Approximately 140,000 Oregonians signed a petition to include an amendment designed to exclude the words "sexual orientation" from the state's hate crime statute as

50. Matthew Sauer, *Crowd Agrees with Gay Rights Opposition*, ST. PETERSBURG TIMES, June 5, 1992, at 5B.

51. *Id.*

52. Marc Cooper, *Queer Baiting in the Culture War*, VILLAGE VOICE, Oct. 13, 1992, at 29-30.

53. *Id.*

54. *Id.*

55. Jeffrey Schmalz, *Gay Politics Goes Mainstream*, N.Y. TIMES, Oct. 11, 1992, at § 18.

56. Cohn, *supra* note 17, at 39.

57. Andrea Stone, *Millions of Gays Mobilizing for Vote 'Of Our Lives,'* U.S.A. TODAY, Oct. 29, 1992, at 5A.

58. *Id.*

59. *See generally* Turque, *supra* note 1.

well as from any other legislation in which it appeared.[60] Although the measure failed 57% to 43%,[61] it succeeded in providing a national forum to anti-gay sentiment.[62] In Oregon's Measure 9, religious conservatives went to the extreme of asking state voters to classify homosexuality as "abnormal, wrong, unnatural and perverse," and to preclude the state legislature from enacting laws protecting citizens on the basis of sexual orientation.[63] The Oregon Citizens Alliance, (OCA), the main force behind Measure 9, suggested that it could "cure" lesbian, gay, and bisexual people, rejecting new scientific evidence which suggests homosexuality has genetic origins.[64] Had Measure 9 succeeded, it would have banned the extension of civil rights protection to homosexuals and required government branches and public schools to actively discourage homosexuality.

> Gay organizations and individuals [could have been denied] use of public facilities such as parks and meeting rooms, state public broadcasting outlets [would have had] to ban pro-gay programming, state licensing boards [could have refused] those deemed "perverse," libraries [would have had] to remove books with any positive references to homosexuality, school textbooks [would have been "cleansed"], AIDS treatment centers [could have been closed], and individual employers and landlords could [have kicked] out 'abnormal' employees and tenants.[65]

Although Oregon's extreme measure failed, Colorado's similar proposal, Amendment 2, passed. Amendment 2 prohibits any municipality from protecting gay people against discrimination on the basis of sexual orientation.[66] As a result, Colorado is the only state in the country to grant the right to discriminate on the basis of sexual orientation.[67] This law effectively voids the existing ordinances in Denver, Aspen, and Boulder that protected lesbian, gay, and bisexual people from discrimination.[68] Although Colorado's Amendment 2 is not as explicitly anti-gay as Oregon's Measure 9, the net result is the same: it undermines existing gay rights. Amendment

60. *Oregon; Perversity, Adversity*, THE ECONOMIST, Oct. 10, 1992, at 31.

61. *Oregon Referendum Leaves Bitterness*, PLAIN DEALER, Nov. 7, 1992, at 5A.

62. Bettina Boxall, *Election Gives Gays Victories, New Battles*, L.A. TIMES, Nov. 5, 1992, at A29.

63. *See* Turque, *supra* note 1, at 37.

64. *Id.*

65. Cooper, *supra* note 51, at 29.

66. Ancel Martinez, *Gay Groups Urge Colorado Boycott Over Discrimination Law*, REUTERS, Nov. 6, 1992 (*available in* LEXIS, Nexis Library, Reuters File). "Tuesday's vote made Colorado the only state in the U.S. with a constitutional provision outlawing rules or laws at the state and local level that protect homosexuals from discrimination." James Coates, *Gays Consider Colorado Boycott*, CHI. TRIB., Nov. 7, 1992, at C1.

67. Coates, *supra* note 66, at C1.

68. *Id.*

2's opponents have challenged the new law on the constitutional grounds that a municipal ordinance cannot be overturned by constitutional amendment and on its violation of the Equal Protection Clause.[69]

The recent wave of anti-gay initiatives and their associated propaganda unleashed an escalating volume of violence. Since the introduction of Measure 9, gay bashing incidents in Oregon have increased by 300 percent.[70] A recent double murder in Oregon illustrates this statistic. Before Oregon's proposed Measure 9 was even scheduled for voting, an African-American lesbian and a white gay man burned to death in Salem when skinheads shouting "Nigger dyke" and "Faggot" threw a homemade bomb into their home, setting it ablaze.[71] Two weeks prior to that night, skinheads had beaten the male victim, Brian Mock, so severely that his friends could not recognize him.[72] In fact, one of the reasons he lived with Hattie Mae Cohens, the female victim, reportedly a physically powerful woman, was to protect himself.[73] These murders demonstrate the effect of the negative propaganda surrounding a proposal such as Measure 9, as well as the collaboration of racism with homophobia in hate crimes.[74] One Measure 9 supporter said, "You know if you give them special status, then they got job quotas. My husband already has to face that on the job with minorities."[75] Fearing the loss of their citizenship, a number of gay Oregonians remarked that these incidents reflect their precarious position in society and the depth of homophobia.[76] However, according to some gay rights proponents, this backlash affirms gay people's new power and is a last hurrah for the blatant gay-bashing displayed at the 1992 Republican Convention in Houston, Texas.[77]

Part II — R.A.V. v. City of St. Paul

Seventeen year-old Robert Viktoria and his two friends were wide awake in the pre-dawn hours of June 21, 1990.[78] Scuttling about in a working class neighborhood in St. Paul, the youths assembled a cross from pieces of a chair, wrapped it in a terry cloth

69. Johnson, *supra* note 34; Boxall, *supra* note 62; Martinez, *supra* note 66.
70. Donna Minkowitz, *Immodest Proposals,* VILLAGE VOICE, Oct. 13, 1992, at 33.
71. *Id.*
72. *Id.*
73. *Id.*
74. *See supra* note 2 and accompanying discussion of interlocking systems of subordination.
75. Cooper, *supra* note 51, at 29.
76. *Id.* at 34-35.
77. *Id.* at 35-37.
78. R.A.V. v. St. Paul, 112 S. Ct. 2538, 2541 (1992).

doused with paint thinner and placed it within the fenced yard of an African-American family that had recently moved into the all white neighborhood.[79] Viktoria lived just across the street from the victims' home.[80] The City of St. Paul charged the juvenile Viktoria with violating the St. Paul Bias-Motivated Crime Ordinance. The ordinance made it a misdemeanor offense to place a burning cross, Nazi swastika, or similar symbol on public or private property.[81]

In *R.A.V. v. City of St. Paul*, the Supreme Court pitted two well-entrenched lines of precedent: the protection of even offensive speech versus the status of "fighting words."[82] Under the fighting words doctrine, the state can criminalize the utterance of fighting words in a face-to-face confrontation when the language creates a clear and present danger of physical violence.[83] Proponents of hate crime legislation maintain that the fighting words doctrine justifies hate crime statutes.[84] Hate crime statutes are generally worded to prohibit particular communications in order to protect the dignity of individuals or shield them from attacks based on their race, ethnicity, gender, sexual orientation, or religion.[85]

The controversy over the St. Paul ordinance concerned the following phrase: "arouses anger, alarm or resentment in others."[86] While the Minnesota Supreme Court limited its construction of the ordinance to those symbols or displays that amount to "fighting words,"[87] the U.S. Supreme Court maintained that the ordinance

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79. Georgia Sargeant, *High Court Strikes Ban on Hate Speech*, TRIAL, Aug. 1992, at 16.

80. *R.A.V.*, 112 S. Ct. at 2541.

81. Bias-Motivated Crime Ordinance, ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990). Specifically, it provides:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouse anger, alarm or resentment in others on the basis of race, color, creed, religious or gender commits disorderly conduct and shall be guilty of a misdemeanor.

Id.

St. Paul could have pursued conviction based on other charges (e.g., terrorist threats and damage of private property). *R.A.V.*, 112 S. Ct. at 2541. In fact, the city also charged Viktoria with assault for causing fear of immediate bodily harm or death. Rubin, *supra* note 33.

82. *See generally R.A.V.*, 112 S. Ct. at 2538.

83. *See id.*

84. Smolla, *supra* note 4, at 208.

85. *Id.*

86. Bias-Motivated Crime Ordinance, ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990).

87. In re Welfare of R.A.V., 464 N.W.2d 507, 510 (Minn. 1991) (upholding the St. Paul ordinance). The U.S. Supreme Court was bound by the Minnesota Supreme Court's construction of St. Paul's Bias-Motivated disorderly conduct ordinance, and therefore accepted the state court's authoritative statement that the ordinance only

applied only to "fighting words" that insult, or provoke violence, on grounds of race, color, creed, religion or gender."

The Supreme Court with Justice Antonin Scalia writing the majority opinion ignored Petitioner's request to modify the *Chaplinsky*[88] formulation of the "fighting words" doctrine[89] and invalidated the ordinance for overbreadth. The Scalia majority held that the ordinance "prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses."[90] Generally, the Court stated, the First Amendment bars the government from proscribing speech or expressive conduct on the basis of its disapproval of the ideas expressed.[91] The Court however reiterated that states may restrict the content of limited types of speech which have "such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[92]

Justice Scalia wrote that although the Court has previously ruled that obscenity, fighting words, and defamation "are not within the area of constitutionally protected speech," cases involving restrictions on these types of speech should be examined on a case-by-case basis.[93] Explaining the Court's traditional treatment of this disfavored category of speech, Justice Scalia wrote:

> What they mean is that these areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.) — not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content.[94]

Further, Justice Scalia declared that the government may not regulate this disfavored speech based on hostility toward, or approval of,

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reached expressions constituting "fighting words." *R.A.V.*, 112 S. Ct. at 2542. Justice Scalia in the majority opinion states that "[i]t is not true that 'fighting words' have at most a 'de minimis' expressive content, ibid, or that their content is in all respects 'worthless and undeserving of constitutional protection' sometimes they are quite expressive indeed." *Id.* at 2542-43.

88. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

89. *Id.*

90. *R.A.V.*, 112 S. Ct. at 2542 (citing Broderick v. Oklahoma, 413 U.S. 601, 610 (1973)). In Chaplinsky v. New Hampshire, the Supreme Court held that government could criminalize "insulting or 'fighting words,'" which it defined as "those which by their very utterance inflict injury or tend to incite an immediate breach of peace." 315 U.S. 568, 572 (1942).

91. *R.A.V.*, 112 S. Ct. at 2542 (citing Cantwell v. Connecticut, 310 U.S. 296, 309-311 (1940) (proscribing speech), and Texas v. Johnson, 491 U.S. 397, 406 (1989) (expressive conduct)).

92. R.A.V., 112 S. Ct. at 2543, (quoting *Chaplinsky*, 315 U.S. at 572).

93. *Id.*

94. *Id.*

non-proscribable messages that they contain.[95] "Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government."[96]

The Court explained excluding "fighting words" from First Amendment protection as follows: "[It] simply means that, for purposes of that Amendment, the unprotected features of the words are, despite their verbal character, essentially a 'nonspeech' element of communication."[97] Therefore, the government may not regulate the use of "fighting words" on the basis of its hostility toward or approval of the underlying message expressed.[98] The Court reasoned that the St. Paul ordinance was facially unconstitutional under the First Amendment because it prohibited speakers from expressing disfavored views on the subjects of race, color, creed, religion or gender but permitted speech containing abusive invectives not addressing those subjects.[99] Consequently, "the ordinance [went] beyond mere content discrimination to actual viewpoint discrimination."[100] The Court stated that the City of St. Paul had no authority to "license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules."[101]

In addition to finding the ordinance facially unconstitutional, the Court held that St. Paul's desire to communicate to the minority groups that it did not condone the "group hatred" of bias-motivated speech did not justify the ordinance.[102] It rejected the city's "secondary effect" claim that the ordinance was required to protect groups who had suffered historical discrimination.[103] Justice Scalia stated that listeners' reactions to certain speech were not a "secondary ef-

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95. *Id.*

96. *Id.* at 2543. The Scalia opinion further referred to New York v. Ferber, 458 U.S. 747, 763 (1982), which upheld New York's child pornography law by expressly recognizing that that case did not rise to the level of censoring a particular literary theme.

97. *R.A.V.*, 112 S. Ct. at 2545.

98. *Id.*

99. *Id.* at 2547. The Court also reasoned that although the Minnesota Supreme Court construed the ordinance to reach only those symbols or displays that amounted to "fighting words," the remaining terms of the ordinance strictly applied to "fighting words" that target it explicitly protected groups. Thus, if a person wished to use "fighting words" combined with other ideas in order to express hostility on the basis of sexual orientation, he or she would not be covered by the ordinance. Consequently, "[t]he First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects." *Id.*

100. *Id.*

101. *Id.* at 2548.

102. *Id.* at 2549.

103. *See* Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) (upholding regulations on "secondary effects" of pornography).

fect" that the Court had in mind because the "emotive impact of speech on its audience is not a secondary effect."[104]

Finally, the Court held that St. Paul's ordinance was not sufficiently narrowly-tailored to serve the compelling state interest of ensuring the basic human rights of groups which have suffered historical discrimination "to live in peace where they wish."[105] Stating that the Court did not doubt the compelling nature of the ordinance's purpose, Justice Scalia added that the danger associated with censorship required the Court to invalidate such legislation where it was not necessary to serve the asserted purpose.[106] The Court found that a regulation not limited to specific topics such as race and gender would have the same beneficial effect, and the St. Paul ordinance was therefore not reasonably necessary to accomplish the government's goals.[107]

Part III — The Impact of R.A.V. v. City of St. Paul

> I see no First Amendment values that are compromised by a law that prohibits hoodlums from driving minorities out of their homes by burning crosses on their lawns, but I see great harm in preventing the people of Saint Paul from specifically punishing the race-based fighting words that so prejudice their community.[108]

The majority's reasoning in *R.A.V.* was flawed and will exacerbate confusion concerning the First Amendment and more importantly, deny at-risk groups protection from hate crimes.[109] Because St. Paul's hate crime ordinance reached beyond "fighting words" and attacked constitutionally protected speech, it went too far to shield its protected classes. The St. Paul ordinance criminalized *any* conduct that "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[110] The *R.A.V.* majority rewrote First Amendment analysis by abandoning the Court's traditional categorical approach to analyzing restrictions on expression. Justice Blackmun wrote that the Scalia majority set

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104. *R.A.V.*, 112 S. Ct. at 2549 (quoting *Renton*, 485 U.S. at 312).

105. *Id.*

106. *Id.* at 2549-50 (citing Burson v. Freeman, 112 S. Ct. 1846 (1992) (plurality) (Slip op., at 8)); Perry Education Assn. v. Perry Local Educator's Assn., 460 U.S. 37, 45 (1983)).

107. *Id.* at 2550. The majority opinion stated that St. Paul's content limitation only served to display the city council's particular hostility towards the enumerated biases. *Id.*

108. *Id.* at 2561 (Blackmun, J., concurring).

109. The author uses the phrase "at-risk" to refer to both protected groups as well as those not protected but equally vulnerable to the violence of hate crimes (e.g., gay, lesbian, and bisexual people).

110. Bias-Motivated Crime Ordinance, ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990).

both "law and logic on their heads" by deciding that Government cannot regulate greatly harmful speech without also regulating speech that does not cause great harm.[111] As a result, the *R.A.V.* decision will either be disregarded as an aberration or cause an across-the-board weakening of traditional speech protections.[112]

Justice Blackmun charged that the "Court manipulated doctrine to strike down an ordinance whose premise it opposed, namely, that racial threats and verbal assaults are of greater harm than other fighting words."[113] In other words, the *R.A.V.* majority was distracted by the temptation to strike at "politically correct speech" and cultural diversity ideology, of which it disapproves.[114] In doing so, the Court failed to apply the Constitution to accomplish the Constitution's purpose.[115] The Scalia majority ignored the wisdom of First Amendment precedent and abandoned the principle of *stare decisis*. Some speech is beneath the dignity of First Amendment protection and the Supreme Court has traditionally accorded differential treatment to content-based regulations of speech in the form of child pornography,[116] obscenity,[117] and defamation.[118]

Hate speech, like other forms of hate crimes, is injurious at varying levels. It poses intrinsic harm to individuals, identifiable groups, and the greater society. Hate speech's intrinsic harm, a deontic harm, manifests itself in the form of grievous, severe psychological injury.[119] Moreover, tolerance for hate speech is inconsistent with the principle of equality of the Fourteenth Amendment.[120]

Hate speech causes the greatest injury to the groups it targets.[121] A 1989 Vanderbilt University report found that "the health of lesbians and gay men is affected when day after day they are forced to say the opposite of what they feel."[122] Thus, "speech likely to cast contempt or ridicule on identifiable groups ought to be regulated to prevent injury to the status and prospects of the mem-

111. *R.A.V.*, 112 S. Ct. at 2560.
112. *Id.*
113. *Id.* at 2560-61.
114. *Id.*
115. *Id.* at 2561.
116. *See* New York v. Ferber, 458 U.S. 747 (1982).
117. *See* Roth v. United States, 354 U.S. 476 (1957).
118. *See* Beauharnaus v. Illinois, 343 U.S. 250 (1952).
119. Robert C. Post, *Free Speech and Religious, Racial and Sexual Harassment: Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 272 (1991). Deontic harm means that "there is an 'elemental wrongness' to racist expression, regardless of the presence or absence of particular empirical consequences such as grievous, severe psychological injury." *Id.*
120. *Id.*
121. *Id.* at 273.
122. Peters, *supra* note 6, at 25, 30.

bers of those groups."[123] If this is the case with speech aimed at a racial group, it ought to apply to gay people as well. Homophobia like racism is a structural subordination of a group based on the idea that the group is inferior.[124]

Homophobic and other biased expressions harm individuals in ways related to "the dignitary torts of defamation, invasion of privacy, and intentional infliction of emotional distress."[125] As a result of hate crimes, gay individuals suffer feelings of humiliation, isolation, and self hatred.[126] The history and reality of gay discrimination in this country magnifies these insults.[127] The identity development of individual lesbian, gay, and bisexual people is damaged by society's anti-homosexual norms and values.[128] Anti-gay hate crimes exacerbate gay people's poor self-image.

Finally, hate speech also harms the greater society by diminishing the quality of the marketplace of ideas. The common public perceptions that homosexuality is sinful and that lesbian, gay, and bisexual people are easy targets fuels anti-gay violence.[129] The purpose of this violence is to isolate both the gay individual and the gay community.[130] Lesbian, gay, and bisexual people can contribute to the free marketplace of ideas if that marketplace does not prey on them. Society will be the lesser without the contributions and voices of all its constituents, including lesbian, gay, and bisexual people.

Hate crime statutes are extremely important to lesbian, gay, and bisexual people, the most frequent target of hate crimes,[131] yet these individuals lack meaningful state or federal protection.[132]

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123. *Id.*

124. *Id.*, (citing Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989)).

125. *Id.*

126. *Id.*

127. *Id.* at 273-274.

128. Peggy Hanley-Hackenbruck, *Psychotherapy and the "Coming Out" Process*, 1 J. GAY & LESBIAN PSYCHOTHERAPY 21, at 22 (1989). Feelings attached to this stigmatized identity include feelings of shame, guilt, doubt, self-loathing, confusion and alienation. *Id.* at 23, 28. The various forms of oppression, such as gay-bashing, that gay, lesbian, and bisexual people experience on a daily basis compounds the aforementioned issues with both interpersonal and social systems losses. Natalie Jane Woodman, *Mental Health Issues of Relevance to Lesbian Women and Gay Men*, 1 J. GAY & LESBIAN PSYCHOTHERAPY 53, at 55 (1989). These losses include loss of self esteem, of spiritual supports, of family members and support systems, of job and income, and of one's lover. *Id.* These losses are also compounded with the rejection gay individuals experience from their nongay peers. *Id.*

129. *See* Nichols, *supra* note 23, at 19.

130. *Id.* The AIDS epidemic has lent greater impetus to such perpetrators of hate crimes. *Id.*

131. *See supra* note 7 and accompanying text.

132. *See*, Part I, *supra*.

Advocates of hate crime statutes maintain that the statutes are necessary to control the upsurge of crimes motivated by a hatred for lesbian, gay, and bisexual people; blacks; Jews; Asians; other minorities; and women.[133] For gay people, hate crime statutes are essential because without them, law enforcement will continue to ignore the problem of gay bashing.[134] When law enforcement officials fail to respond promptly and seriously to hate crimes, they lose the trust of the gay community. The upsurge of anti-gay violence warrants a government response beyond just tackling the problem as mere assault or other criminal offense. The government has the burden of protecting its minority citizens from hate-motivated violence by responding to the increase in hate crimes.

Part IV — Hate Crimes Statutes after R.A.V.

In his concurrence in the judgment, Justice Harry Blackmun warned, "[t]he majority opinion signals one of two possibilities: it will serve as precedent for future cases, or it will not. Either result is disheartening."[135] Justice Blackmun's foreboding response to the majority opinion is ringing true in the period since *R.A.V.*, during which a number of federal and state courts have reviewed the constitutionality of similar statutes with mixed results.[136] However, in June 1993, the Supreme Court decided *Wisconsin v. Mitchell*,[137] and remedied some of the confusion created by *R.A.V.*[138]

133. Rubin, *supra* note 33, at 1.

134. *See supra* notes 5-7 and accompanying text.

135. *R.A.V.*, 112 S. Ct. at 2560. Although the judgment was unanimous, Justices White, O'Connor, Blackmun, and Stevens did not concur in the majority's reasoning. Justice White warned of an adverse effect of the ruling. *Id.* at 2550 (White, J., concurring). Justice White reasoned that the statute was too broad, because it outlawed not only expression that has long been held to deserve no protection (e.g., causing a riot) but also speech that merely causes "hurt feelings, offense or resentment." *Id.*

136. Two Florida cases, in particular, illustrate both the confusion and the contradiction that the *R.A.V.* decision invites in subsequent First Amendment jurisprudence. Reviewing a statute with the exact same text, in cases sharing comparable facts and involving assaults provable beyond a reasonable doubt, two courts of appeals applied the *R.A.V. test only to yield contradictory holdings. See* Dobbins v. State, 605 So.2d 922, 925 (Fla. Dist. Ct. App., 5th Dist. 1992) and Richards v. State., 17 Fla. L. Weekly D2595, 1992 WL 335899 (Fla. App. 3d Dist. 1992).

The *R.A.V.*-induced inconsistency is not restricted to the two Florida cases. Two other courts also wrestled with the formless rationale that is the standard of *R.A.V.*. *See, e.g.*, State v. Wyant, 597 N.E.2d 450 (Ohio 1992) (holding that the effect of an ethnic intimidation statute as it punished only motive is to create a "thought crime" in violation of state and federal protection of the First Amendment rights); State v. Plowman, 838 P.2d 558 (Or. 1992) (holding that the state intimidation statute is not unconstitutionally vague under either state or federal constitutional standards, nor does it proscribe speech).

137. 113 S. Ct. 2194 (1993).

138. Whereas the St. Paul ordinance prohibited racially and otherwise discriminatory conduct, the Wisconsin statute provided for enhancement of penalties for of-

Mitchell involved a black male defendant who incited a group of other black males to attack a white boy who was walking in their vicinity.[139] The group beat the boy into a coma that lasted four days.[140] A circuit court convicted Mitchell of aggravated battery and sentenced him to two years in prison, the maximum sentence under the Wisconsin sentencing guidelines.[141] However, Wisconsin's hate crime statute enhanced that sentence to four years.[142] On appeal, the Wisconsin Court of Appeals affirmed the lower court decision.[143] However, the Wisconsin Supreme Court reversed, holding that the statue "'violates the First Amendment directly by punishing what the legislature has deemed to be offensive thought.'"[144] The Court, distinguishing *Mitchell* from *R.A.V.*, upheld the Wisconsin hate crime statute with a rationale that limited the *R.A.V.* decision.

Justice Rehnquist, writing for a unanimous Court, contrasted the statute in *Mitchell* from the one in *R.A.V.*[145] Whereas the St. Paul ordinance "was explicitly directed at expression," the Wisconsin statute "is aimed at conduct unprotected by the First Amendment."[146] The Court rejected the argument that the statute punished bigoted thought, dismissing the view that conduct can be called "speech" whenever the actor intends it to express an idea.[147] The Court stated that the First Amendement does not protect conduct such as physical assault.[148]

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fenses that targeted victims on the basis of an unlawful discrimination. *Mitchell*, 113 S. Ct. at 2197. This is a point of fact which the U.S. Supreme Court used to distinguish *R.A.V.* from *Mitchell*, thereby justifying the different result. The Wisconsin high court reasoned that the statute, which enhanced the potential penalty for criminal actors if the state proved that the actor intentionally selected the victim on the basis of the victim's race, religion, color, disability, sexual orientation, national origin, or ancestry, violated the First Amendment on grounds that it was overly broad in its effort to punish offensive thought, the effect of which was to chill free speech. *Mitchell*, 473 N.W.2d at 814-815. The *Mitchell* court reasoned that:

> [t]he conduct of "selecting" is not akin to the conduct of assaulting, burglarizing, murdering and other criminal conduct. It cannot be objectively established. Rather, an examination of the intentional "selection" of a victim necessarily requires a subjected examination of the actor's motive or reason for singling out the particular person against whom he or she commits a crime.

Id. at 813.

139. *Mitchell*, 113 S. Ct. at 2197.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.* (citing 485 N.W.2d 807, 811 (1992)).
145. *Id.* at 2201.
146. *Id.*
147. *Id.* at 2199.
148. *Id.*

While the Court determined that the statute punished conduct, it also acknowledged that the statute considered the motive of racial bias in enhancing the penalty.[149] However, it pointed out that judges have traditionally considered motive an aggravating factor in sentencing.[150] In addition, the Court recognized that the Wisconsin statute provided enhanced penalties only for only bias-related crimes[151] "because this conduct is thought to inflict greater individual and societal harm."[152] By quoting Blackstone, the Court suggests that the statute's focus on bias crimes is justified because "'it is [ ] reasonable that among crimes of different natures those should be most severely punished, which are the most destructive of the public safety and happiness.'"[153]

Finally, the Court rejected the overbreadth challenge to the statute's constitutionality. Justice Rehnquist found that the statute's potential "chilling effect on free speech" was "far more attenuated and unlikely that contemplated in traditional 'overbreadth' cases."[154]

While *R.A.V.* prohibited broadly tailored anti-bias crimes statutes, *Mitchell* stands for the proposition that laws enhancing penalties for bias-motivated crimes do not violate the First Amendment. *Mitchell* serves to strengthen confidence in existing enhancement statutes for bias-motivated crimes and should pave the way for the enactment of such statutes in the 23 states that do not provide enhanced penalties for bias-motivated crimes.

Conclusion

Despite having made some significant political and social gains, gay people remain the most frequent targets of hate crimes or gay-bashing. Municipal and state response to the upsurge of hate crimes has been to draft statutes proscribing conduct that rises to the level of "fighting words" and is aimed at protected groups, sometimes even including lesbian, gay, and bisexual people. On this basis, the Supreme Court struck down a statute that proscribed hate crimes on grounds that it was overbroad and violated the First Amendment protection of freedom of speech. First Amendment scholars expected the Supreme Court to use the facts of *R.A.V.* to distinguish between offensive speech that incites or threatens violence against others, which is unprotected, and speech

149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.* (citing 4 W. BLACKSTONE, COMMENTARIES *16).
154. *Id.*

that angers the audience against the speaker, which may be protected. Instead the Court held that the government cannot single out one type of fighting words (e.g., cross-burning) on the basis of its message. The Court reasoned that to do so would squelch unpopular ideas. In addition, the Court abandoned the categorical approach to First Amendment analysis finding that obscenity, defamation, and "fighting words" are constitutionally-recognized forms of speech that are subject to governmental regulation. This created an underinclusive analysis, defying logic and the principle of *stare decisis*.

The result of the *R.A.V.* decision will either be ignored or will further confuse the hate crime debate. Subsequent cases visiting the constitutionality question of hate crime statutes under First Amendment standards indicate that *R.A.V.* will serve to confuse this arena of jurisprudence. However, the Supreme Court lessened the confusion somewhat by upholding the penalty-enhancement statute in *Mitchell*. Despite *R.A.V.*'s bar of overbroad regulation of hate crimes, it does not by any means preclude closely tailored statutes designed to shield against hateful conduct targeted at protected groups. Lesbian, gay, and bisexual people stand to gain the most from such a statute, because they top the list of the targets of hate crimes. The constitutionality of a gay-protective hate crime statute will thus likely depend on the clarity of its terms and the narrowness of its scope of prohibited conduct.